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No. 97-454

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT BESTFOODS

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Aerojet-General Corporation and its Cordova subsidiaries (collectively, "Aerojet") have admitted that they are not adverse to the United States and Michigan in any significant way. Aerojet Br. in Opp. 4 & n.1, 12. Aerojet nevertheless has submitted a brief at the time appropriate for *defending* the judgment under review, but has addressed the question presented primarily to argue that the judgment should be *reversed* as to respondent Bestfoods (formerly CPC International Inc.). Bestfoods submits this Supplemental Brief pursuant to Rule 25.5 in order to respond to the arguments for reversal in Aerojet's brief, which were not available at the time Bestfoods submitted its response to the other briefs arguing for reversal.[1]

1. Contrary to its position below, Aerojet now finds nothing to criticize in the legal standard applied by the court of appeals, but disputes only whether "the court of appeals correctly applied the direct liability theory to CPC." Br. 26 n.10. But see, *e.g.*, Aerojet C.A. Br. as Appellee 28-36; see also U.S. Br. 48 (noting Aerojet's position below). But Aerojet never argued in the lower courts that CPC could be held liable under the Sixth Circuit's standard of operator liability. Thus, Aerojet did not contend, as it does now, that CPC operated the Muskegon facility directly, but rather accused CPC of being an operator through the "mechanism" of Ott II. Aerojet C.A. Br. as Appellee 32 n.19. Moreover, Aerojet sharply rejected (*ibid.*) any "distinction between operation of a subsidiary corporation and operation of" a facility as defined in 42 U.S.C. § 9601(9).

If this Court agrees that the court of appeals used the correct legal standard, it is unlikely to expend its scarce resources to second-guess the Sixth Circuit's application of that standard to the voluminous record in this case. The Court long has emphasized that it does not sit to "review evidence and

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[1] As it did in its principal brief to this Court, Bestfoods hereafter refers to itself using its former name, "CPC."

discuss specific facts" in response to a claim that a lower court has misapplied a correct rule of law. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Moreover, even if this Court were to adopt a new legal standard to resolve the question presented here, the proper course would be to remand the case for reconsideration by the Sixth Circuit. See, *e.g.*, *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 558 (1994). That course is particularly appropriate where, as here, the court of appeals has not yet had reason to engage in full clear-error review of the district court's extensive factual findings. See Bestfoods Br. 43-45.

2. If, however, the Court does endeavor to decide whether the evidence can sustain the judgment under the correct legal standard, it should not be misled by Aerojet's fanciful view of the record. To expose every gross misstatement would consume a full-length brief. Suffice it to point out that neither court below adopted the vast majority of Aerojet's contentions. A few glaring errors require special response.

a. To begin with, contrary to Aerojet's assertion (Br. 36 n.12), the district court did *not* find that CPC directly conducted the day-to-day operations at the Muskegon facility in the sense of direct operation understood by the Sixth Circuit and supposedly endorsed now by Aerojet.[2] To the contrary, the district court's sole reference to "day-to-day operations" identified "CPC's involvement • • • *through CPC officials who served within Ott II management*" (Pet. App. 111a; emphasis added) — the very tautological fallacy, effectively presuming veil-piercing in order to find it, that we exposed in our principal brief (at 30-31). Aerojet's argument thus reflects an implicit endorsement of the district court's (and the government's) legal analysis — at least when that analysis is being applied to CPC. Aerojet also tries to leapfrog Ott II's existence by stating inaccurately that "CPC took over Ott [I]" in 1965. Br. 6; see also Br. 9. In fact, CPC never owned either the Muskegon site

[2] By contrast, the district court headed a section of its opinion: "Aerojet's direct involvement with the site." Pet. App. 94a.

or any other assets of Ott I; that property belonged to a separate subsidiary corporation, Ott II. Pet. App. 65a-67a.

b. Aerojet goes further astray in exaggerating (Br. 9-10) the role of CP Development in relation to Ott II.[3] Aerojet maintains (Br. 9) that the "Development Company's board of directors functioned as the board for Ott [II]." That fabrication is entirely at odds with the pertinent findings of the district court that "[t]he Ott II board of directors was an active board" that "functioned as a major source of power and decision-making." Pet. App. 67a. No findings referred to a "Development Company[] board of directors."

In our principal brief (at 4), we explained the actual function of CP Development, a division of CPC that had minimal staffing. See C.A. App. 3326; see also *id.* at 3331-3333. We add here only that the evidence showed both that Ott II was free to accept or reject CP Development's substantive recommendations (C.A. App. 3339-3340; Tr. 599-600, 1410-1414) and that Ott II's participation in CP Development's efforts to encourage technological interaction among the CPC subsidiaries was negligible. C.A. App. 2866-2867; Tr. 356-357, 1231, 1315, 1430-1431; Eiszner Dep. 111-114.

In addition, Aerojet omits a key fact in its misleading description of the involvement with Ott II of Beverly Warner, who was president of CP Development beginning in 1969: Warner also was *CEO of Ott II* from 1970 to 1972. Pet. App. 70a-71a. Aerojet's suggestion (Br. 9) that, merely in his role as president of CP Development, Warner made "pricing decisions, production decisions, and scheduling decisions" for Ott II certainly would have come as news to Warner. Warner testified that, when he was president of CP Development but not yet CEO of Ott II, he "didn't have anything to do with prices[,] • • • didn't have anything to do with [Ott II's] customers[,]

[3] Aerojet comes late to this mistaken belief. It told the court of appeals that "CPC permitted Ott [II] to function essentially as it had before the acquisition by CPC." Aerojet C.A. Br. as Appellee 6. See Pet. App. 65a-67a.

[and] didn't have anything to do with [Ott II's] improvements in [its] manufacturing process." Warner Dep. 33.

c. Aerojet also attempts (Br. 13-14) to inflate CPC's involvement with Ott II environmental matters by citing every scrap of paper reflecting any attention by CPC personnel to Ott II environmental issues during Ott II's seven years of operation. The cited memoranda speak for themselves. Most reflect contacts that had nothing to do with the Ott II waste disposal program or its negotiations with the MWRC over compliance issues, but reveal only incidental legal and administrative services that CPC provided to Ott II. The record actually pertinent to Ott II environmental matters discloses that the *Ott II management and board* made all substantive decisions about waste disposal and that the relevant technical recommendations — which Ott II followed without material exception — came from Ott II's outside consultants, not from CPC. See Bestfoods Br. 7; Pet. App. 69a.

Like the government, Aerojet tries to transform G.R.D. Williams — a lawyer-lobbyist with no technical expertise whose responsibilities involved the politics of dealing with regulators but did not extend to determining or influencing technical solutions (C.A. App. 3269) — into some kind of environmental czar. Although our principal brief (at 47-49) explained Williams' limited involvement with Ott II, some of Aerojet's misstatements require a further response.

Aerojet's assertion (Br. 10) that "CPC required Ott [II] personnel to check with Williams (or other CPC officials) before answering questions about Ott's environmental compliance" overlooks the long history of meetings with the MWRC, the agency that affected the substance of Ott II's disposal program, that did not involve Williams in any way.[4] See

[4] Aerojet's contention that "[a] CPC official on Ott's Board *directed* Ott to contact Williams for help with Ott's disposal problems" (Br. 11; emphasis added) illustrates its liberties with the record. Setting aside the lack of evidence that Williams had any ability to "help with • • • disposal problems," the record shows that the Ott II board member "*suggested* that G.R.D. Williams of CP be consulted," and specifically recommended contacting Williams *"to learn how a similar problem was handled at Pekin"* (C.A. App. 2004, 2017 (emphasis added)).

Bestfoods Br. 7, 48. Ott II's occasional communications with Williams — the parent corporation's specialist in government relations regarding environmental affairs — did not have even an attenuated effect on the waste disposal practices at issue here.

Equally spurious is Aerojet's claim (Br. 12) that "Williams managed to save money for CPC in its operating units by delaying environmental management at Ott" because "Ott never built a biological waste treatment facility," although its consultant had suggested building one "by 1970." To begin with, the consultant's "1970" estimate was based on a prediction that federal surface water pollution standards eventually would require Ott II to provide additional treatment of wastewater discharged into the Muskegon River (C.A. App. 2133) — discharges that are not at issue here. By 1970, moreover, Ott II was negotiating for the use of the Muskegon County wastewater treatment plant, and had no reason to duplicate those treatment facilities on-site. See Pet. App. 76a.

d. Finally, Aerojet casts aspersions on the sale of the Ott II site and business to Story, an approach that persuaded neither of the courts below. Contrary to Aerojet's contention (Br. 14), there was no evidence that the Muskegon site presented a "serious environmental liability" in 1972, especially because the purge wells developed by Ott II continued in operation. Indeed, there was no liability at all: the enactment of CERCLA was eight years in the future, and no other type of liability was on the horizon. It also bears emphasis that the distribution as a dividend of the $6.6 million cash assets of Four Lakes (*i.e.*, Ott II; see Aerojet Br. 14) — which no longer had operations, tangible assets, or outstanding liabilities — should scarcely raise questions, particularly in light of the $5 million in capital advances that CPC had made to Ott II over the years. See Pet. App. 77a; Ex. 805 (also noting $4 million price of Ott I assets

in 1965). Aerojet's further contention (Br. 14) that the presence of Warner on Story's board amounted to an "interest in Story" that "CPC retained" is simply absurd.

* * * * *

One can only speculate as to the reasons why Aerojet, a party that prevailed below and that has, by its own admission, virtually no interest in the outcome of the question presented, has chosen to file a brief seeking reversal of the judgment below in favor of CPC. In any event, as the Sixth Circuit recognized (Pet. App. 17a-18a), the types of activities on which Aerojet relies do not show that CPC "directly operate[d] the [Muskegon] facility itself."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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